A **BANK KERJASAMA RAKYAT MALAYSIA BHD**

v.

SEA OIL MILL (1979) SDN BHD & ANOR

B FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
GOPAL SRI RAM FCJ
[CIVIL APPEAL NO: 02(f)-23-2009 (W)]
C 22 OCTOBER 2009

CIVIL PROCEDURE: *Summary judgment - Banking - Islamic banking facility - Liability as guarantor - Whether guarantor could again raise issues decided by High Court against borrower whereas judgment* D *against borrower maintained by Court of Appeal - Triable issues - Rules of the High Court 1980, O. 14 - Contracts Act 1950, s. 81*

CIVIL PROCEDURE: *Summary judgment - Guarantee - Liability as guarantor - Islamic banking facility - Whether guarantor could again raise issues decided by High Court against borrower whereas judgment* E *against borrower maintained by Court of Appeal - Triable issues - Rules of the High Court 1980, O. 14 - Contracts Act 1950, s. 81*

CONTRACT: *Guarantee - Liability as guarantor - Islamic banking facility - Summary judgment - Whether guarantor could again raise issues* F *decided by High Court against borrower whereas judgment against borrower maintained by Court of Appeal - Triable issues - Rules of the High Court 1980, O. 14 - Contracts Act 1950, s. 81*

BANKING: *Banks and banking business - Guarantees - Liability as* G *guarantor - Islamic banking facility - Summary judgment - Whether guarantor could again raise issues decided by High Court against borrower whereas judgment against borrower maintained by Court of Appeal - Triable issues - Rules of the High Court 1980, O. 14 - Contracts Act 1950, s. 81*

H The appellant was given leave to appeal on the following question of law: whether the 2nd respondent as a guarantor could again raise issues decided by the High Court against the 1st respondent as the borrower, whereas judgment against the 1st respondent was maintained by the Court of Appeal and, furthermore, the 2nd I respondent did not and has never challenged the guarantee

agreement signed. The appellant/plaintiff filed a suit against the 1st respondent (borrower and principal debtor) and the 2nd respondent (guarantor) for a claim of RM30,983,718.53 pursuant to the Islamic banking facility of Al-Tarkhis (Bai-Al-Inah Principle). The appellant thereafter filed an application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980. The senior assistant registrar dismissed the application but on appeal to the judge in chambers, the said appeal was allowed and summary judgment entered against the 1st and 2nd respondents. Both respondents filed appeals to the Court of Appeal. The Court of Appeal struck out the 1st respondent's appeal, but allowed the 2nd respondent's appeal on the ground that the appellant's capacity to give revolving credit to the 1st respondent was a serious issue of fact and law that needed to be tried by the calling of witnesses. Hence, the present appeal by the appellant.

Held (allowing the appeal)
Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) The reasoning given by the Court of Appeal was incorrect. Since the 1st respondent's appeal was struck out, it meant that the O.14 summary judgment given by the High Court against the 1st respondent still remained. It followed that the 2nd respondent's liability as the guarantor for the 1st respondent also remained by virtue of s. 81 of the Contracts Act 1950. The suit by the appellant against the 2nd respondent as the guarantor was therefore valid. *Ginlon (M) Sdn Bhd v. MBf Finance Bhd* (foll). (para 17)

(2) The question of whether the appellant could or could not carry on Islamic banking did not arise. The simple fact was that the 1st respondent received a large sum of money from the appellant and then defaulted in its repayment. The 2nd respondent was also sued by the appellant based on his guarantee for the said revolving credit. Both the 1st and 2nd respondents were well aware of their respective contractual responsibilities and liabilities in the event of default of repayment. (para 18)

(3) From the available evidence, there was no triable issue arising from the appellant's claim against the 2nd respondent. The appellant was properly authorised to carry on its Islamic banking according to the minutes of the meeting of its Board of Directors dated 29 April 1993 and also the minutes of the

A meeting of the Majlis Pengawasan Syariah Bil. 2/94 dated 29 November 1994, which clearly stated their approval to the overdraft facility according to the Syariah concept of Bai-Al-Inah that was named as Al-Tarkhis (Istimewa) facility. (para 19)

B **(4)** For the above reasons, the question posed would be answered in the negative. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

C Perayu telah diberi kebenaran untuk merayu atas soalan undang-undang yang berikut: sama ada responden kedua sebagai penggerenti boleh membangkitkan isu-isu yang telah diputuskan oleh Mahkamah Tinggi terhadap responden pertama sebagai peminjam, sementara penghakiman terhadap responden pertama D telah dikekalkan oleh Mahkamah Rayuan dan, lagipun, responden kedua tidak dan tidak pernah mencabar perjanjian gerenti yang ditandatangani. Perayu/plaintif memfail suatu guaman terhadap responden pertama (peminjam dan penghutang utama) dan responden kedua (penggerenti) untuk tuntutan sebanyak E RM30,983,718.53 menerusi kemudahan perbankan Islam Al-Tarkhis (Prinsip Bai-Al-Inah). Perayu kemudiannya memfail suatu permohonan untuk penghakiman terus menerusi A. 14 Kaedah-kaedah Mahkamah Tinggi 1980. Penolong pendaftar kanan menolak permohonan itu tetapi atas rayuan ke hakim dalam kamar, F rayuan tersebut dibenarkan dan penghakiman terus dicatatkan terhadap responden pertama dan kedua. Kedua-dua responden-responden memfail rayuan-rayuan ke Mahkamah Rayuan. Mahkamah Rayuan membatalkan rayuan responden pertama, tetapi membenarkan rayuan responden kedua atas alasan bahawa G keupayaan perayu untuk memberi kredit pusingan kepada responden pertama merupakan satu isu fakta dan undang-undang serius yang perlu dibicara dengan memanggil saksi-saksi. Oleh yang demikian, rayuan semasa oleh perayu.

H **Diputuskan (membenarkan rayuan)**
Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Pertimbangan yang diberi oleh Mahkamah Rayuan adalah tidak betul. Oleh kerana rayuan responden pertama telah dibatalkan, I ia bermaksud bahawa penghakiman terus A. 14 yang dicatat oleh Mahkamah Tinggi terhadap responden pertama masih

kekal. Ini bererti bahawa liabiliti responden kedua sebagai penggerenti untuk responden pertama juga kekal mengikut s. 81 Akta Kontrak 1950. Guaman oleh perayu terhadap responden kedua sebagai penggerenti adalah, oleh itu, sah.

(2) Soalan sama ada perayu boleh atau tidak boleh meneruskan perbankan Islam tidak berbangkit. Fakta yang sebenar ialah bahawa responden pertama telah menerima satu jumlah besar wang dari perayu dan kemudian telah ingkar semasa pembayaran balik. Responden kedua juga disaman oleh perayu berdasarkan gerentinya untuk kredit pusingan tersebut. Kedua-dua responden-responden pertama dan kedua jelas sedar akan tanggungjawab kontraktual dan liabiliti-liabiliti mereka masing-masing jika terjadi pengingkaran dalam pembayaran balik.

(3) Dari keterangan yang ada, tidak ada apa-apa isu yang perlu dibicara yang berbangkit daripada tuntutan perayu terhadap responden kedua. Perayu telah diberikuasa dengan betul untuk meneruskan perbankan Islam mengikuti minit mesyuarat Lembaga Pengarahnya bertarikh 29 April 1993 dan juga minit mesyuarat Majlis Pengawasan Syariah Bil. 2/94 bertarikh 29 November 1994, yang jelas menyatakan kelulusan mereka terhadap kemudahan overdraf mengikut konsep Syariah Bai-Al-Inah yang telah dinamakan sebagai kemudahan Al-Tarkhis (Istimewa).

(4) Oleh kerana sebab-sebab di atas, soalan yang dikemukakan akan dijawab secara negatif.

Case(s) referred to:
Ginlon (M) Sdn Bhd v. MBf Finance Bhd [2004] 2 CLJ 169 CA ***(foll)***

Legislation referred to:
Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978, s. 14(1)(g)
Contracts Act 1950, s. 81
Companies Act 1965, s. 226(3)
Development Financial Institutions Act 2002, s. 129(1)
Rules of the High Court 1980, O. 14

For the appellant - Khairuddin Abdul Ghani (John Clark with him); M/s Amir Ruhana & Khairuddin
For the respondent - K Sinniah; M/s AI Nathan

[Appeal from Court of Appeal; Civil Appeal No: W-02-298-2003]

[Editor's note: For the Court of Appeal judgment, please see Sea Oil Mill (1979) Sdn Bhd & Anor v. Bank Kerjasama Rakyat Malaysia Bhd [2009] 3 CLJ 564.]

Reported by Suresh Nathan

JUDGMENT

Hashim Yusoff FCJ:

[1] On 18 May 2009 this court gave leave to appeal to the appellant on the following question of law:

> Whether the 2nd Respondent as a Guarantor could again raise issues decided by the High Court against the 1st Respondent as the Borrower whereas Judgment against the 1st Respondent was maintained by the Court of Appeal and furthermore the 2nd Respondent did not and has never challenged the Guarantee Agreement signed.

We allowed the appeal and now give our reasons.

Background

[2] (i) The appellant (plaintiff) filed a suit in Kuala Lumpur High Court against the 1st respondent as the borrower (Principal Debtor) and the 2nd respondent as the guarantor for a claim of RM30,983,718.53 as at 20 October 1998 pursuant to an Islamic Banking Facility of Al-Tarkhis (Bai-Al-Inah Principle).

(ii) The 1st and 2nd respondent entered memorandum of appearance on 8 January 1999.

(iii) The appellant thereafter filed an application for summary judgment on 4 February 1999 pursuant to O. 14 Rules of the High Court 1980 ("RHC").

(iv) The hearing proceeded on affidavits filed therein and the application was dismissed before the senior assistant registrar but on appeal to judge in chambers, the said appeal was allowed and summary judgment was entered against both the 1st and 2nd respondent. The grounds of judgment by the learned High Court Judge appeared at pp. 45 to 58 of the record of appeal (I).

(v) Both respondents filed an appeal to the Court of Appeal on 12 May 2003 and on the grounds as appeared in the memorandum of appeal dated 12 May 2003 at pp. 32 to 35 of the rekod rayuan (I).

(vi) On 15 May 2008, the Court of Appeal struck out with costs the 1st respondent's appeal as it was in liquidation since 5 October 2005 and had not obtained leave of court in compliance with s. 226(3) of the Companies Act 1965, to proceed with the appeal. But the Court of Appeal allowed the 2nd respondent's appeal. Hence this appeal before us.

[3] Learned counsel for the appellant submitted that the Court of Appeal in allowing the 2nd respondent's appeal decided on only one issue ie,:

> Whether at the date of the facility was granted to the 1st Respondent in August 1997, the Plaintiff (Appellant) could lawfully grant the Facility under Islamic Banking principles when the Plaintiff was a co-operative Society registered or deemed registered under the Co-Operatives Societies Act 1993. (See Rekod Rayuan Tambahan page 6, lines 15-25.)

[4] The Court of Appeal held that this is an issue of both facts and law. As such it was a serious issue which could only be decided after witnesses had given evidence on behalf of the plaintiff as to its capacity in law to carry on Islamic banking business.

[5] In arriving at its decision the Court of Appeal had relied on the Development Financial Institutions Act 2002 ("Act 618") whereby the appellant was, *inter alia*, one of the Financial institutions listed in the schedule of the order. As such the appellant is also governed by Act 618, which under s. 129(1) of the same Act, prohibits a prescribed institution from carrying any Islamic banking business or Islamic financial business before obtaining the prior written approval of the Central Bank of Malaysia. Therefore the Court of Appeal held that it was not a simple and obvious case because there were issues to be tried.

[6] Learned counsel for the appellant submitted that the Court of Appeal had erred in applying Act 618. As was held by the High Court, the appellant came under and was bound by the provisions of Akta Bank Kerjasama Rakyat Malaysia Berhad

(Peruntukan Khas) 1978 ("Act 202") and the by-laws under Act 202. The learned High Court Judge found as a fact that the appellant's operation using the Syariah principles were in order and in accordance of the Appellant's Board of Directors' resolution as provided under Act 202.

[7] He further submitted that since the appeal of the 1st respondent as the principal borrower/debtor was struck out, it meant that the judgment of the High Court against it still stands. This also meant that the 2nd respondent, as the guarantor for the 1st respondent, remains liable for the debt. Reference was made to s. 81 of the Contracts Act 1950 which provides:

> The liability of the surety is co-extensive with that of the principle debtor, unless it is otherwise provided by the contract.

[8] In the case of *Ginlon (M) Sdn Bhd v. MBf Finance Bhd* [2004] 2 CLJ 169, Abdul Aziz Mohammad JCA (as he then was) opined regarding s. 81 of the Contracts Act 1950 as follows:

> ... that is a contract of guarantee. The remedy of the person to whom the guarantee is given is therefore to sue the surety on his undertaking in the contract of guarantee, if the third person defaults.

[9] The submission of learned counsel for the 2nd respondent is basically an attempt to defeat the appellant's claim by saying that the appellant was not authorised to carry on Islamic Banking. He referred to s. 14(1)(g) Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 ("Act 202") which provides:

> 14.(1) In addition to the powers, functions, duties, and responsibilities conferred or imposed on the Bank by the Ordinance, the rules made thereunder, and the by-laws of the Bank, the Bank may:
>
> (a) ...
>
> (b) ...
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> (c) ...
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> (d) ...
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> (e) ...
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> (f) ...
>
> (g) carry on any other business expressly authorized by the Minister with the concurrence of the Minister of Finance.

[10] It was his submission that Act 202 did not mention that Bank Rakyat could carry on Islamic Banking.

[11] He further submitted that in an O. 14 application for summary judgment, an applicant would have to show that it is a plain and obvious case.

Court's Finding

[12] There is no dispute that, at the 1st respondent's request the appellant gave a revolving credit facility of RM20 million and that the 2nd respondent had stood as a guarantor for the said facility. (See appeal record 221 exh. "ABO4").

[13] Clause 17 of the guarantee provides for the continuing liability of the guarantor as follows:

> **Continuing Liability Of Guarantor**
>
> The obligations of the Guarantor hereunder shall not be discharged except by performance and then only to the extent of such performance. Such obligations shall not be subject to any prior notice to or demand to the Guarantor with regard to any default of the Customer and shall not be impaired by any extension of time forbearance or concession given to the Customer or any assertion or failure of any security created by or in pursuance of the Security Documents and or any modification or amplification of the provisions thereof contemplated by the terms thereof or any failure of the Customer to comply with any requirements of any law regulations or order in Malaysia or of any political subdivision or agency thereof.

[14] It is also common ground that the 1st respondent defaulted in its repayment. Hence the suit by the appellant against the 2nd respondent being the 1st respondent's guarantor for the said facility.

[15] It is the finding of the High Court that although the appellant was not a company under the provisions of the Companies Act 1965, it did not mean that it could not carry on Islamic banking operation. The learned High court judge found as a fact that the appellant's operation using the Syariah concept was in order as it was in accordance with the resolution of its Board of Directors, as specially provided under the Act 202.

[16] The Court of Appeal in striking out the appeal of the 1st respondent which was the principal borrower/debtor however allowed the appeal by the 2nd respondent who was the guarantor for the 1st respondent, on the grounds that the appellant's capacity to give the revolving credit to the 1st respondent was a serious issue of fact and law that needed to be tried by the calling of witnesses.

[17] With respect, we cannot agree with the reasoning given by the Court of Appeal. Since the 1st respondent's appeal was struck out it meant that the O. 14 summary judgment given by the High Court against the 1st respondent, still remains. It follows that the 2nd respondent's liability as the guarantor for the 1st respondent also remains, by virtue of s. 81 of the Contracts Act 1950. The suit by the appellant against the 2nd respondent as the guarantor is therefore valid, following the decision of the Court of Appeal in the case of *Ginlon (M) Sdn. Bhd. v. MBf Finance Bhd., supra.*

[18] The question whether the appellant could carry on Islamic banking or not does not arise. The simple fact is that the 1st respondent received a large sum of money from the appellant and then defaulted in its repayment. The 2nd respondent was also sued by the appellant based on his guarantee for the said revolving credit. Both the 1st and 2nd respondents were well aware of their respective contractual responsibilities and liabilities in the event of default of repayment.

[19] From the evidence available, we do not see any triable issue arising from the appellant's claim against the 2nd respondent. We also agree with the learned High Court Judge that the appellant was properly authorised to carry on its Islamic banking according to the minutes of the meeting of its Board of Directors dated 29 April 1993 (see appeal record 344 exh. ABO37) and also the minutes of the meeting of the Majlis Pengawasan Syariah Bil. 2/94 dated 29 November 1994 which clearly stated their approval to the overdraft facility according to Syariah concept of Bai-Al-Inah which was named as Al-Tarkhis (Istimewa) facility.

[20] For the above reasons we would answer the question posed, in the negative. The appeal by the appellant is allowed with costs fixed at RM20,000 for the appellant. The order of the High court is restored. Deposit is to be given to the appellant towards costs.